scarcely a rule at all, of *Smyth* v. *Ames,* making value a question of judgment. In the cases, judgments continue to vary as widely as ever. The courts are probably too firmly committed to a consideration of various elements to expect them to adopt the definite rule of fixing base values on prudent investment. Whether legislatures will step in here, and whether a legislative act making prudent investment the basis would be held to be constitutional is for the future to reveal. For a fuller discussion of these methods of valuation see 15 MICH. L. REV. 205. E. C. G.

DUE PROCESS OF LAW IN PROCEDURE. — There are two classes of cases which may arise under the "due process" provisions of the 5th and 14th Amendments of the United States Constitution, so far as rules of procedure are concerned. One embraces cases of new remedial processes which may be criticized as too radical. The other consists of cases of old processes which may be criticized as obsolete and out of harmony with prevailing conceptions of justice. Due process may thus be said to fill the wide space between those innovations which carry us so far away from established methods as to remove the safeguards which are deemed essential to the protection of person and property, and those ancient remedies which enlightened modern opinion condemns as barbarous.

Most of the cases which have come before the courts belong to the first class, and in dealing with them the problem has been how to determine the point at which departure from settled usage becomes so great as to undermine what are considered the fundamental principles of judicial procedure. Certainly the procedure in England at the time of the emigration cannot be "fastened upon the American jurisprudence like a straight-jacket only to be unloosed by constitutional amendment". *Twining* v. *New Jersey,* 211 U. S. 78, 101.

But the cases falling into the second class are much less numerous. It has been said that a process is due process of law if it can show the sanction of settled usage both in England and this country. *Hurtado* v. *California,* 110 U. S. 516. It would seem reasonable, however, to assume that the settled usage might become so remote in point of time and so out of harmony with contemporary ideas, as to cease to enjoy the quality of due process.

This argument was made in *Miedreich* v. *Lauenstein,* 232 U. S. 236, against the ancient rule that a sheriff's return cannot be falsified in the action in which it is made, and that a party not served with process, who is thereby deprived of his day in court, may nevertheless lose his property by judicial sale on a default judgment based on a false return, without being allowed to show that he was never in fact served. It appeared, however, that this rule of the ancient common law was still currently adhered to in a number of American states, and the Supreme Court of the United States felt itself unable to say that the rule was inconsistent with the due process clause of the 14th Amendment.

A more striking case of the same type has just come before the Supreme Court. In *Ownbey* v. *John Pierpont Morgan, et al.,* U. S. Sup. Ct., April

11, 1921, No. 99, an action was commenced by attachment in Delaware against a non-resident. The defendant attempted to appear, but was refused the right to do so unless he put in special bail to the amount of the value of the property held under the attachment. This was the statutory rule in Delaware, and the defendant, who was unable to put in the special bail, attacked the rule as operating to deprive him of property without due process of law.

It appeared that this harsh rule was derived from the Custom of London in foreign attachment, and had been brought over to America by the colonists, and that in Delaware it could show statutory continuity down to the present time. The court cites a number of cases from other seaboard states where the Custom of London also obtained a foothold, but an investigation of the statutory history of the rule in those states seems to indicate that in every one of them the rule long since succumbed to the progress of enlightened civilization and passed over the Styx into the shadowy land of legal tradition where the ghosts of ancient laws wander restlessly forever. Sodom was thought worthy of being saved if but ten righteous men could be found there, and it is possible that our constitution should be equally charitable toward any medieval custom which could show the endorsement of even a single modern jurisdiction. But the court took a rather cheerless view of the purpose of the constitution, saying that, "However desirable it is that the old forms of procedure be improved with the progress of time, it cannot rightly be said that the Fourteenth Amendment furnishes a universal and self-executing remedy. Its function is negative, not affirmative, and it carries no mandate for particular measures of reform." This sounds like the exclusion from the purview of the constitution of practically all cases of outgrown processes, and would probably justify the current use of trial by battle. But the court may not have intended to take such broad ground against rising standards of justice. Its decision is probably correct, but its reasons seem to accord too high a degree of respectability to the lingering relics of a ruder age. E. R. S.

PROFITS FROM SALE OF CAPITAL ASSETS AS INCOME: TAXABLE UNDER SIXTEENTH AMENDMENT.—The Supreme Court of the United States has taken another step in clearing up the legal concept of income. In four cases, decided March 28, 1921, the troublesome problem of whether or not profits arising from the sale of capital assets shall be considered as income for the purposes of the Income Tax was settled. These cases all arose under the Income Tax act of 1916, as amended in 1917, 39 Stat., ch. 463, p. 756, 40 Stat., ch. 63, p. 300, and were all suits to recover taxes assessed, and paid under protest. All involved the question of the constitutionality of the assessment under the 16th Amendment, the contention of the taxpayer in each case being that the fund taxed was not "income" within the meaning of the Amendment. In *Merchants' Loan & Trust Co.* v. *Smietanka*, the plaintiff was trustee under a will of property, the net income of which was to be paid to the testator's widow for life, and after her death, to the children until each